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No. 93-1230

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

DAVID P. SCHNEIDER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Military Appeals

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PETITIONER'S REPLY BRIEF

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QUESTIONS PRESENTED

I. Whether a service member's court-martial was improperly constituted and lacked jurisdiction to try him because an officer, junior in rank to the service member, participated as a juror in the service member's court-martial and voted on his guilt, and then prior to sentencing was dismissed as a juror when the trial judge learned that the officer (1) was junior in rank to the service member being tried, and (2) was serving as a juror on the court-martial in violation of Article 25(d)(1) of the Uniform Code of Military Justice, 10 U.S.C. § 825(d)(1) (1988).

II. Whether a court-martial is collaterally estopped from retrying a service member for misconduct for which he was tried in a state court and acquitted.

III. Whether federalism precludes a general officer from overriding a decision of a state court in domestic matters.

IV. Whether the errors in the serviceman's court-martial and military appellate review amount to a denial of due process in violation of the Fifth Amendment of the Constitution.

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INTRODUCTION

A. Misstatement of the Facts

The government's latest attempt to prevent petitioner, a man who continues to maintain his innocence of all charges against him,* from obtaining the kind of review of his case the Constitution mandates is unpersuasive. Indeed, this Court must not be swayed by the self-serving interpretation of irrelevant authorities by the same staff

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* The government concedes that petitioner "was charged by Missouri state authorities with first-degree assault for the incident at the hotel," that during the Missouri trial petitioner testified about the "incident at the hotel" and "about the toilet tank lid incident," and that the Missouri jury found petitioner not guilty of the charges against him. (Brief in Opp. 5) In addition the government fails to note that petitioner passed a government polygraph examination concerning the "incident at the hotel" and "the toilet tank lid incident."

of military lawyers who have distorted the issues in this case since it first was presented to the Army Court of Military Review.

Unfortunately, those responsible for representing the government and deciding military cases have misstated facts and blatantly lied. In *United States v. Schneider*, 34 M.J. 639 (ACMR 1992), for example, the Army Court of Military Review states:

> We have examined the assertions of error personally raised by appellant pursuant to *United States v. Grostefon*, 12 M.J. 431 (CMA 1982) . . .

Id. at 646. No such assertions of error exist because petitioner never submitted anything to the Court pursuant to *Grostefon*. It is this sort of sloppiness and lack of attention to detail that marks the manner in which the government and the military courts have treated this case.

Because the "facts" of a case are seldom still in dispute at this stage of the proceedings, one can only assume that the purpose of the government's 6-page long regurgitation of the facts is to divert attention from the legal arguments they prefer not to address. There are no fewer than 10 factual errors in the government's summary of the facts. The government's obsession with the facts is perhaps the clearest indication that it lacks confidence in the conviction. If the government succeeds in focusing the Court's attention on the facts as opposed to the significant legal issues presented in this case, then proper review of the issues and exercise of civilian control of the military will never occur.

B. Lack of Court-Martial Jurisdiction

In addition to misstating the facts, the government misstates the law under the Uniform Code of Military Justice and the Manual for Courts-Martial concerning the eligibility of officers to serve as members of courts-martial.

The government states that Article 25(a) of the Uniform Code of Military Justice provides that "[a]ny com-

missioned officer on active duty is eligible to serve on all courts-martial." Art. 25(a), UCMJ, 10 U.S.C. § 825(a) (1988). (Brief in Opp. 8) The government then argues that the "preference in Article 25(d)(1), UCMJ, 10 U.S.C. 825(d)(1), for court members who are senior in rank to an accused is not jurisdictional and can be waived." *Id.*

What the government fails to set forth is the specific language of Article 25(d)(1) of the Uniform Code of Military Justice which provides that "[w]hen it can be avoided, *no* member of an armed force may be tried by a court-martial any member of which is junior to him in rank or grade." Art. 25(d)(1), UCMJ, 10 U.S.C. § 825(d)(1) (1988) (emphasis added).

A fair reading of Article 25 of the Uniform Code of Military Justice sets forth two requirements with respect to officers serving on courts-martial. The first requirement is that any commissioned officer on active duty is eligible to serve on courts-martial. The second requirement is that, when it can be avoided, no member of an armed force, that is an officer, warrant officer, or enlisted member, may be tried by a court-martial in which any court member—officer, warrant officer, or enlisted member—is junior in rank or grade to the member being tried.

Rule 912(f)(1) in the Manual for Courts-Martial, cited by the government (Brief in Opp. 8), sets forth the grounds for challenging court members. R.C.M. 912 (f)(1), MCM (1984). Rule 912(f)(1) provides that "[a court] member shall be excused for cause whenever it appears that the member: (A) Is not competent to serve as a member under Art. 25(a) . . ." R.C.M. 914 (f)(1) & (A), MCM (1984).

The Analysis of Rule 912(f)(1), also cited by the government (Brief in Opp. 8), states that "[*e*]*xcept for matters affecting the composition of the court-martial* (*see* Articles 16 and 25(a) . . .) improper selection of members is not a jurisdictional defect." Analysis, R.C.M.

912(b) at A21-54, MCM (1984) (emphasis added). The inference to be drawn from this statement is that matters affecting the composition of the court-martial, that is, the eligibility of officers to serve on courts-martial, are jurisdictional defects.

Counsel for Petitioner respectfully submits that Article 25 of the Uniform Code of Military Justice clearly provides that any commissioned officer on active duty is eligible to serve on a court-martial. If this is true, the only ground provided in Article 25 of the Uniform Code of Military Justice for challenging such an officer as ineligible or incompetent to sit as a court member is because he is junior in rank or grade to the member being tried by court-martial. Such a challenge goes to the competency of the officer to sit on the court-martial and is jurisdictional error according to the statement in the Analysis cited by the government. *See id.*

In addition, the United States Court of Military Appeals has never held that the failure of the government to comply with the seniority provision of Article 25(d)(1), UCMJ, 10 U.S.C. § 825(d)(1) is not jurisdictional error. *See United States v. Newcomb*, 5 CMR 4 (CMA 1978) (failure of commander to comply with provisions of the UCMJ in appointing parties to a court-martial rendered court-martial jurisdictionally defective).

The government contends that "petitioner waived any objection to the junior officer's participation in his court-marital" and that this "fact-bound conclusion warrants no further review." (Brief in Opp. 8) In *McClaughtry v. Deming*, 186 U.S. 49 (1902) (the presence of members who do not meet the requirements of the statute is jurisdictional error), the Supreme Court of the United States did not hold that the participation of Regular Officers on the accused's court-martial was waived by the accused and thus presented a "fact-bound conclusion warrant[ing] no further review;" instead the Supreme Court held that the presence of members who do not meet the requirements of the statute is jurisdictional error.

If the government is correct in contending that "petitioner waived any objection to the junior officer's participation in his court-martial" and that "any defect [in this regard is] not jurisdictional" (Brief in Opp. 8), why did the military judge dismiss the junior officer as a court member after findings and prohibit her from participating in adjudging the sentence in petitioner's case. (R. 739-58). In other words, if the "petitioner waived any objection to the junior officer's participation in his court-martial" as the government contends he did, and the error is "not jurisdictional," why was the junior member not permitted by the military judge to participate in adjudging a sentence too?

The reason the junior member was dismissed is because Article 25(d)(1) of the Uniform Code of Military Justice states that "[w]hen it can be avoided, no member of an armed force may be tried by a court-martial any member of which is junior in rank to him in rank or grade." In short, the junior member was dismissed by the military judge because she was serving on the court-martial in violation of Article 25(d)(1), UCMJ, 10 U.S.C. § 825 (d)(1) (1988). Absent a showing by the government that her service on the court-martial was necessary, her presence on the court-martial was jurisdictional error, and as long as she served on it, the court-martial was improperly constituted. *See McClaughry v. Deming*, 186 U.S. 49 (1902) (the presence of members who do not meet the requirements of the statute is jurisdictional error). *Contra United States v. McGee*, 15 M.J. 1004, 1005-06 (NMCMR 1983) (the presence of members who do not meet the requirement of the statute is *not* jurisdictional error).

The jurisdictional issue presented in this case is of great significance to over a million men and women serving in the armed forces of the United States. The military must follow the rules prescribed by Congress for conducting courts-martial. Congress enacted these rules to ensure that the constitutional and due process rights of young

men and women serving in the armed forces of the United States are protected. In *Deming* the Supreme Court of the United States, in exercising civilian control over the military, held that an improperly constituted court-martial did not have jurisdiction to try an accused. In *Schneider*, the military similarly relies on an improperly constituted court-martial to convict a soldier who, as noted, was acquitted previously by a civilian court for misconduct based on the same facts.

This case provides the Supreme Court with an opportunity to remind military officials that they must conduct court-martial proceedings strictly in accordance with the statutory guidelines set forth by the Congress in the Uniform Code of Military Justice. A decision by the Supreme Court emphasizing this point, as the Court did in *Deming*, will encourage military courts to follow the statutory guidelines in conducting courts-martial, and will reaffirm the important concept of civilian control of the military and the fact that the Supreme Court of the United States is conscious of its responsibility in this regard.

C. Double Jeopardy

The government's arguments against applying the doctrine of collateral estoppel are equally misleading. The thrust of *Heath v. Alabama*, 474 U.S. 82 (1985) and *Abbate v. United States*, 359 U.S. 187 (1959) both deal with cases of *autrefois convict*. And, in those cases, the defendants were found to have violated the "peace and dignity" and to have committed "offenses." (Brief in Opp. 9) But, here, is a case of *autrefois acquit*. Said another way, no offense was committed. No peace or dignity was violated. The error that the military courts committed was to claim that despite that and despite Justice O'Connor's reasoning in *Heath* "they" are not collaterally estopped because this principle of law does not apply to them.

What is being challenged here, in the broader context of double jeopardy, is the willful abandonment of the normal, sound practices and precepts of law by the military that the rest of the citizenry takes for granted. Again, the government merely asserts that issues that went to the very heart of the matter adjudicated by the Missouri court were not resolved. They were resolved. If the State of Missouri thought perjury had been committed, then they would have prosecuted the petitioner for that. They did not. What the state court jurors believed was clear and unambiguous, namely, that petitioner did not commit the offenses charged.

The government's attempt to redefine petitioner's argument by suggesting that the level of cooperation between authorities warrants "a different result" is ill-advised. (Brief in Opp. 9) This case does not need more fabrication on the part of the government to further cloud the issues. Petitioner does suggest, however, that such Orwellian tactics are totally out of place in this forum.

In the entire recorded history of the Military Justice System there is not one case where a defendant was retried after having been acquitted by a civilian court, until now. Now, the government would have this Court believe that this is commonplace.

The government would have this Court believe that a single case, *United States v. Cowan*, 34 M.J. 258 (CMA 1992), should act as the appropriate justification for allowing a federal officer to override an entire body of civil law. The government would have this Court believe that a convening authority because he "did not exceed the power granted under the Uniform Code of Military Justice," should be allowed to set himself up as being in a better position to judge domestic relations issues than the duly appointed state judges. *Id.* at 260. Conveniently, *Cowan* relies only on military cases to come to this conclusion. Despite the fact that the United States Court of Military Appeals admits that they "do not find an express

grant" of such powers, the government wants this power to extend even to those issues already decided by civilian judges. What the military gets, if this decision stands, is the express power to regulate every domestic dispute that involves a military person by allowing the commander to decide what party should get what part of the service person's pay check.

One of the stipulations enunciated in *Cowan* is that the "conditions cannot: (1) increase the severity of the sentence." *Id.* In fact, the convening authority's action increased the severity of the sentence. The real effect of returning $30,000, annually, to the petitioner, but denying him the ability to use those funds by mandating that they be sent to his ex-wife, is to cause him to pay taxes at a $30,000 higher rate on *all* of his income; in petitioner's case this amounts to having to pay an additional $667 in federal income taxes. Because the convening authority is not in a position to view the entire domestic situation, he can not necessarily be aware of all the consequences of his actions. *See United States v. Estrella*, 35 M.J. 836 (ACMR 1992) and *United States v. Wright*, 35 M.J. 899, 902 n.6 (ACMR 1992).

Thus, in real terms, petitioner is caused to pay back more to the government—$667 in additional income taxes—as a result of the convening authority's "clemency" than would have been the case absent such "clemency." This, of course, is no more than a fine by a different name. While the amount in this case is small, the principle is large.

D. Civilian Review of the Military

The whole point of civilian review of the military is to prevent flagrant abuses of power and such blatantly arrogant excesses. Petitioner contends categorically that he is innocent of all the charges. The proper civilian authorities examined all the same issues in open court and petitioner was acquitted. Only the improper conduct of

the military judicial system allowed the very same evidence to be used a second time securing thereby a conviction. The Army has, so far, proven to itself that it can do and say whatever it wants to.

CONCLUSION

The government has failed to provide adequate explanations for the Army's continued lack of accountability. In a lopsided appeal to this Court's sensibilities that attempts to paint petitioner as a criminal, and thus not worthy of the due process of the law, rather than focusing on the important new powers the military has garnered unto itself, the government fails to justify why it thinks it can now retry any service person at will, ignore basic principles of law like collateral estoppel, or run rampant over the basic due process rights accorded all the citizens. Finally, in failing to follow Congressional intent, the law set forth in the Uniform Code of Military Justice, and its long tradition of using only panel members senior to the accused, and even its own rules against increasing sentence severity, the government demonstrates its arrogant disregard for the statutory nature of Article I courts.

This case presents an opportunity for this Court to curb these excesses. Petitioner fervently hopes the Court will accept his Petition for a Writ of Certiorari and grant the appropriate relief.

Respectfully submitted,

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